Louisiana Law Review

Volume 67 | Number 1
Fall 2006

A Problem in Need of Repair: Louisiana's Subsequent Remedial Measures Rule

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I. INTRODUCTION

American legal theory has long rejected the view that "because the world gets wiser as it gets older, therefore it was foolish before."[1] Such a position leads to weak inferences when one attempts to read fault into the conduct of another. In the area of evidence of subsequent remedial measures, the weak inference of guilt forcibly collides with a strong social policy favoring exclusion. Although Louisiana recognizes the exclusionary rule when the underlying theory of liability is "negligence or culpable conduct,"[2] we seem to ignore this aspect of conventional wisdom when the plaintiff is invoking products liability under the Louisiana Products Liability Act. Instead, the judicial interpretation of Louisiana Code of Evidence article 407[3] allows the trier of fact to infer fault from the mere act of implementing post-accident modifications.

Part II of this comment examines the legal history of the subsequent remedial measures rule, discussing the evolution of Federal Rule of Evidence 407 and Louisiana Code of Evidence article 407. Despite the drafters' initial desire to follow the federal rule,[4] the substance of article 407 and the jurisprudential application of the exclusionary rule remain stagnant as the federal rule has evolved to reflect changing attitudes toward including products liability within the scope of the rule. In 1997, Congress amended Federal Rule of Evidence 407 to expressly include products liability within the provision's protection, thereby officially adopting the position of the majority of federal circuits

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1. FED. R. EVID. 407 advisory committee's note (1997).
2. LA. CODE EVID. ANN. art. 407 (2005).
3. Article 407 provides:

> In a civil case, when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Article does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility or precautionary measures, or for attacking credibility.

LA. CODE EVID. ANN. art. 407 (2005).

4. *See* LA. CODE EVID. ANN. art. 407 cmt. (a) (1988).

and many states.[5] The current position in Louisiana, however, maintains the antiquated Louisiana Supreme Court interpretation of article 407 as exclusive of products liability, a pronouncement proclaimed in the seminal case of *Toups v. Sears, Roebuck & Co.*[6]

Part III argues that the time is ripe for Louisiana to revisit and reevaluate its interpretation of the subsequent remedial measures rule. Specifically, article 407 needs to be expanded to bar the admissibility of subsequent remedial measures evidence when the underlying theory of culpability is products liability. Jurisprudence discussing this article is sparse and old. The most recent Louisiana Supreme Court decision to consider the *Toups* ruling was announced in 1994.[7] The two appellate decisions since the 1997 federal amendment cite *Toups* for propositions based on grounds unrelated to article 407.[8]

Commentators have repeatedly criticized the *Toups* decision.[9] They chastise the Louisiana Supreme Court for failing to address the position of the majority of federal circuits at the time of *Toups* and for relying on external authority without providing an explanation for why such a novel construction of article 407 was adopted as Louisiana law.[10] Moreover, they condemn the court for overstating the conformity of its holding with prior Louisiana law.[11]

Part IV argues that, upon reevaluation of article 407, Louisiana must embrace the federal position. Allowing the use of subsequent remedial measures as evidence promotes inferences of guilt with weak probative value.[12] These legal relevancy concerns reinforce

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5. FED. R. EVID. 407 advisory committee's note (1997).

6. 507 So. 2d 809 (La. 1987).

7. *See* Hines v. Remington Arms Co., 648 So. 2d 331, 334 (La. 1994).

8. *See* Chauvin v. Sisters of Mercy Health Sys., St. Louis, Inc., 818 So. 2d 833 (La. App. 4th Cir.), *writ denied*, 825 So. 2d 1194 (La. 2002); Maher v. Costa Lines Cargo Serv., Inc., 691 So. 2d 1303 (La. App. 4th Cir.), *writ denied*, 695 So. 2d 985 (La. 1997).

9. *See, e.g.*, David M. Bienvenu, *Subsequent Remedial Measures and the Louisiana Code of Evidence: Some Thoughts on Interpretation*, 51 LA. L. REV. 1069 (1991); J.M. Garner, Toups v. Sears, Roebuck and Co.: *Admissibility of Subsequent Remedial Measures in Products Liability Cases*, 62 TUL. L. REV. 660 (1988); Robert Rene Rabalais, Toups v. Sears, Roebuck, & Co.: *Re-Assessing Admissibility of Subsequent Remedial Measures Evidence in a Products Liability Suit*, 48 LA. L. REV. 985 (1988); Elvige C. Richards, *Admission into Evidence of Postaccident Warnings in Product Liability Suits:* Toups v. Sears, Roebuck and Co., 34 LOY. L. REV. 448 (1988).

10. Rabalais, *supra* note 9, at 997.

11. Garner, *supra* note 9, at 666.

12. Joseph A. Hoffman & George D. Zuckerman, *Tort Reform & Rules of Evidence: Saving the Rule Excluding Evidence of Subsequent Remedial Actions*, 22 TORT TRIAL & INS. PRAC. L.J. 497, 508 (1987).

a strong social policy encouraging manufacturers to continue improving their product, a collision of forces that urges exclusion. Thus, the exclusionary rule for subsequent remedial measures should be extended to products liability actions. Jury confusion presents an additional concern when juries are asked to weigh the value of a weak inference of fault against the strong social policy favoring exclusion. Measures enacted after an accident may not be relevant in proving what a manufacturer knew or should have known at the time of the injury; however, it is difficult to convey this reality to a jury assessing liability. Finally, the current treatment produces different results in Louisiana if litigated in federal or state court. This inconsistency undoubtedly inspires defendants to seek removal of the case to federal court in order to avoid harsh treatment.[13]

Part V concludes that Louisiana must expand article 407 to bar the admissibility of subsequent remedial measures as evidence in a products liability case. This solution can be achieved through an amendment to article 407 or through a new judicial interpretation, reversing *Toups*. Regardless of the means chosen for modernizing the provision, policy and logic dictate that Louisiana must embrace the federal position, rendering evidence of subsequent remedial measures inadmissible in products liability cases.

II. BACKGROUND AND LEGAL HISTORY

The drafters of Louisiana Code of Evidence article 407 expressed an initial desire to follow the federal counterpart;[14] however, the two provisions are drastically different today because of contrasting treatment of products liability and its place within the subsequent remedial measures rule.[15] Through the 1997 amendment to Federal Rule of Evidence 407, Congress expressly included products liability within the scope of the rule, an act codifying the position of the majority of federal circuits at the time.[16] In contrast, Louisiana maintains its interpretation of article 407 as exclusive of products liability, a position which has remained stagnant since the Louisiana Supreme Court originally interpreted the provision in *Toups v. Sears, Roebuck & Co.*[17]

13. Bienvenu, *supra* note 9, at 1082.
14. *See* LA. CODE EVID. ANN. art. 407 cmt. (a) (1988).
15. *Compare* LA. CODE EVID. ANN. art 407 (2005), *with* FED. R. EVID. 407.
16. FED. R. EVID. 407 advisory committee's note (1997).
17. 507 So. 2d 809 (La. 1987).

A. Federal Rule of Evidence 407

The exclusion of subsequent remedial measures as evidence is a fundamental aspect of the law.[18] Federal Rule of Evidence 407, which codified the common law rule, precludes the use of subsequent remedial measures to prove negligence or culpable conduct.[19] Through its enactment, the rule recognized two important policy considerations: a concern that evidence of subsequent remedial measures is logically irrelevant in assessing liability, and the fear of deterring safety measures.[20]

Commentators agree that evidence of measures implemented after an event or injury is "logically irrelevant" in determining whether an individual breached a duty of care because the improvements may have been motivated by factors completely unrelated to negligence.[21] The Rules Committee explained that such conduct cannot be an admission of fault because that conduct is equally consistent with an accident or an injury exacerbated by contributory negligence.[22] Depending on the unique facts and circumstances of the case, the inferences drawn from subsequent remedial measures suggesting that the defendant failed to exercise due care "can vary considerably in probative force."[23] Recognizing that a trier of fact may erroneously infer guilt from conduct, the Committee added that, when considered in conjunction with a strong social policy encouraging further safety measures, evidence of subsequent remedial changes demands exclusion.[24] This legislative balance was premised on the fear that admitting evidence of subsequent remedial measures would thwart progression toward a safer environment.[25] Simply, the policy of

18. *See, e.g.*, Rabalais, *supra* note 9, at 986 (explaining that evidence of subsequent remedial measures has "always [been] inadmissible" in showing negligent or culpable conduct).

19. *Id.*

20. FED. R. EVID 407 advisory committee's note (1972):

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before . . . (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." (citations omitted).

21. Rabalais, *supra* note 9, at 987.

22. FED. R. EVID. 407 advisory committee's note (1972).

23. Jack B. Weinstein & Margaret A. Berger, 2 WEINSTEIN'S FEDERAL EVIDENCE § 407.03[2] (Joseph M. McLaughlin ed., 2d ed. 2006).

24. *Id.*

25. *Id.*

encouraging individuals to take safety measures outweighed the possible relevance of a determination of negligence. As a result, the rule prevents injured plaintiffs from introducing evidence of subsequent improvements to prove negligence or other conduct falling into the umbrella category of "culpable conduct."[26]

Nevertheless, the applicability of the general subsequent remedial measures rule to actions predicated on products liability remained the source of debate long after the enactment of Rule 407. Following the landmark case of *Ault v. International Harvester Co.*,[27] the relationship between evidence of subsequent remedial measures and products liability became a heated issue that divided the federal circuits for decades.[28] The circuit split essentially turned on the *Ault* court's disparate treatment of the distinctive features separating "negligence or culpable conduct" and products liability. *Ault* and its progeny deemed the differences between "negligence or culpable conduct" and strict products liability[29] insurmountable.[30] This distinction rendered it "manifestly unrealistic" to include a manufacturer within the policy considerations motivating the exclusionary rule.[31] The court did not envision that a contemporary manufacturer would forego implementing improvements, risking additional lawsuits and a negative public image, solely out of fear that evidence of subsequent remedial measures could be admitted as evidence in a suit arising from an injury sustained prior to the improvement.[32] Thus, the *Ault* court deemed the exclusionary rule to have little impact on the conduct of a manufacturer.[33]

Proponents of this restrictive theory emphasize the distinction between negligence and strict products liability, arguing that, while

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26. Marcie J. Freeman, Comment, *Spanning the Spectrum: Proposed Amendments to Federal Rule of Evidence 407*, 28 TEX. TECH. L. REV. 1175, 1177 (1997).

27. 528 P.2d 1148 (Cal. 1974).

28. Bienvenu, *supra* note 9, at 1074.

29. While many federal decisions talk in terms of "strict products liability," as does the Louisiana Supreme Court in *Toups*, it is important to note that following the adoption of the Louisiana Products Liability Act ("LPLA"), the standard in Louisiana is no longer "strict products liability." *See* LA. REV. STAT. ANN. § 9:2800.51 (2005). Nevertheless, this discussion is applicable to the LPLA because under the LPLA the legislature introduced a less blameworthy system. *See* Frank L. Maraist & Thomas C. Galligan, LOUISIANA TORT LAW § 15-5 (1996). Thus, if strict products liability fits within the category of "culpable conduct" as the majority of the federal circuits argue, *a fortiori*, the logic is equally relevant to a less-blameworthy theory of liability.

30. *Ault*, 528 P.2d at 1152.

31. *Id.*

32. *Id.*

33. *Id.*

negligence allocates blame based on the conduct of the defendant, strict products liability looks only to the condition of the product independent of the conduct of the manufacturer.[34] According to this view, society holds the manufacturer responsible for the accident or injury regardless of whether his decisions or actions were reasonable—the standard for determining negligence.[35] Thus, advocates deem exclusion of the evidence of subsequent remedial measures unnecessary since fault is not an issue.[36]

Nevertheless, during this time of uncertainty, the majority of the federal circuits held Federal Rule of Evidence 407 equally applicable to products liability and negligence actions.[37] In fact, at the time of the 1997 amendment to the rule, the Eighth and Tenth Circuits stood alone in interpreting Rule 407 as excluding products liability.[38]

In extending Rule 407 to strict liability, Judge Richard Posner of the Seventh Circuit Court of Appeals asserted that he was not persuaded by the "purely semantic argument" advanced by the Eighth Circuit.[39] He reasoned that the factors motivating an alleged tortfeasor in his determination as to whether to implement subsequent remedial measures following an accident were equally influential to a manufacturer.[40] To Judge Posner, a failure to

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34. Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New—Relevant—Answer to an Old Problem*, 81 VA. L. REV. 1141, 1151 (1995). *See also* RESTATEMENT (SECOND) OF TORTS § 402A (1965); W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 99 (5th ed. 1984).

35. Burns, *supra* note 34, at 1152. *See also* Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322 (10th Cir. 1983) ("Society chooses to place responsibility . . . with the manufacturer, regardless of the reasonableness of the manufacturer's design decisions. In actions against such manufacturers, therefore, the jury's sole inquiry is on the product.").

36. C. Paul Carver, *Subsequent Remedial Measures 2000 and Beyond*, 27 WM. MITCHELL L. REV. 583, 590 (2000).

37. *See, e.g.*, Gauthier v. AMF, Inc., 788 F.2d 634 (9th Cir. 1986); Flaminio v. Honda Motor Co., 733 F.2d 463 (7th Cir. 1984); Grenada Steel Indus., Inc. v. Ala. Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Joseph v. Harris Corp., 677 F.2d 985 (3d Cir. 1982); Hall v. Am. S.S. Co., 688 F.2d 1062 (6th Cir. 1982); Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981); Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980).

38. *See* Burke v. Deere & Co., 6 F.3d 497, 506 (8th Cir. 1993), *superseded by statute*, FED. R. EVID. 407, as amended; Huffman v. Caterpillar Tractor Co., 908 F.2d 1470, 1480–81 (10th Cir. 1990), *superseded by statute*, FED. R. EVID. 407, as amended; Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977).

39. *Flaminio*, 733 F.2d at 469.

40. *See, e.g.*, Burns, *supra* note 34, at 1154–55 (citing *Flaminio*, 733 F.2d at 469) ("The analysis is not fundamentally affected by whether the basis of liability is the defendant's negligence or his product's defectiveness or inherent

extend Rule 407 would potentially discourage remedial measures regardless of whether the theory of culpability was products liability or negligence.[41] Ultimately, the overwhelming majority of federal circuits agreed with Judge Posner's argument that the deterrent effect of admitting evidence of post-injury remedial measures existed under either theory.[42] Thus, these circuits deemed an extension of the rule to be justified.

Proponents of the majority position analogized the allocation of blame in a strict products liability case to that in a negligence action.[43] This argument admits that the focus in strict products liability is on a defect in the product and not on fault. This difference, however, does not justify inclusion of evidence of subsequent remedial measures, as such evidence thwarts the societal goal of promoting safety. Furthermore, it is often subject to abuse when admitted.[44] The Fourth Circuit further reasoned that in a failure to warn case, the differences between the theories of negligence and products liability become especially insignificant, as both fundamentally revolve around the issue of whether the warning was adequate.[45]

The United States Fifth Circuit Court of Appeals addressed the relevancy issue in *Grenada Steel Industries v. Alabama Oxygen Co.*[46] Judge Alvin Rubin acknowledged that judges and lawyers cannot ascertain the precise reason why a change was made in a product.[47] The relevant question in assessing liability is whether

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dangerousness. In either case, if evidence of subsequent remedial measures is admissible . . . the incentive to take such measures will be reduced.").

41. *Id.*

42. *Id. See, e.g.*, *Gauthier*, 788 F.2d at 637; *Cann*, 658 F.2d at 60; *Werner*, 628 F.2d at 857.

43. Burns, *supra* note 34, at 1155.

44. Carver, *supra* note 36, at 591.

45. *Werner*, 628 F.2d at 858. This sentiment is equally true in Louisiana where liability for an inadequate warning requires scienter, rendering this theory of products liability similar to negligence. *See* LA. REV. STAT. ANN. § 9:2800.53(9) (2005); *id.* § 9:2800.57; *id.* § 9:2800.59(B); John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 LA. L. REV. 565, 614, 620 (1989). Analogous to the negligence standard, the LPLA holds a manufacturer responsible for risks of which he knew or should have known at the time of distribution. LA. REV. STAT. ANN. § 9:2800.57 (2005).

46. 695 F.2d 883 (5th Cir. 1983).

47. *Id.* at 888. The court went on to state:

> It seems to us, with no greater expertise than like-trained lawyers and judges, that changes in design or in manufacturing process might be made after an accident for a number of different reasons . . . . We cannot really know why changes are made by industry generally or why a change was made in a particular product in the absence of evidence

the product or design was defective when it left the manufacturer's control, regardless of motive or knowledge.[48] Thus, evidence of subsequent remedial measures has little relevance in determining whether the product was defective at an earlier time and therefore should be excluded in products liability.[49]

The 1997 amendment to Rule 407 resolved the debate, as Congress unequivocally clarified its position on the applicability of the subsequent remedial measures rule to products liability cases.[50] Pursuant to the amended rule, evidence of subsequent remedial measures is inadmissible to establish "a defect in a product, a defect in a product's design, or a need for warning or instruction."[51] The Advisory Committee's Note explicitly states that these additional areas were included to officially adopt the position advanced by the majority of the federal circuits.[52]

B. Louisiana Code of Evidence Article 407

In Louisiana, evidence of subsequent remedial measures is inadmissible to prove "negligence or culpable conduct."[53] Such evidence, however, is admissible to prove "ownership, authority, knowledge, control, or feasibility of precautionary measures."[54] In

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on the question. Instead, we ought to consider the probative value of such evidence on the point at issue.

Id.

48. *Id.*

49. *Id.* at 887.

50. The amended rule clarifies:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

51. *Id.*

52. FED. R. EVID. 407 advisory committee's note (1997) ("This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions.").

53. LA. CODE EVID. ANN. art. 407 (2005).

54. *Id.* The comments to the article do not explain the second sentence of article 407, other than the blanket statement that "[t]his Article generally follows Federal Rule of Evidence 407." LA. CODE EVID. ANN. art. 407 cmt. (a) (1988). The Advisory Committee's Note to Rule 407 provides insight into the purpose of these exceptions:

addition to deleting the "if controverted" requirement found in Federal Rule of Evidence 407,[55] Louisiana's Code of Evidence is silent on the issue of products liability, leaving the crucial decision of applicability to judicial interpretation.[56]

The Louisiana Supreme Court cemented Louisiana's interpretation of article 407 as exclusive of products liability actions in *Toups*.[57] In this products liability suit against the manufacturer of an allegedly defective water heater, the court analyzed whether the subsequent addition of warnings to an owner's manual and water heater were admissible as evidence. The *Toups* court recognized the general rule that measures enacted after an accident or injury are inadmissible as evidence of negligent conduct—a rule inspired by the long-accepted social policy that encourages individuals to implement adequate measures to thwart future harm.[58]

The court held that the general rule excluding evidence of remedial modifications did not include actions predicated on products liability when the underlying issue was "credibility and precautionary measures," such as the existence of an alternative

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> The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment.

FED. R. EVID. 407 advisory committee's note (1972). These exceptions to article 407, however, are not the focus of this comment.

55. In Louisiana, the exception to the general rule need not be controverted, which is an absence that deviates from the federal standard and common law. Bienvenu, *supra* note 9, at 1083. This omission, however, presents a danger that the exceptions will swallow the rule, primarily the knowledge exception. Knowledge is a fundamental aspect of negligence; thus, knowledge will always be an issue, and article 407 will not apply to many negligence cases. *Id.*

56. The comments further explain:

> If the substantive law underlying the case is based on some concept of negligence or culpable conduct, this Article applies. But if the substantive law is based on any other theory, this Article is inapplicable . . . . *The elusiveness of the distinction is illustrated by the strict and product liability cases. This Article does not attempt specifically to address or resolve these issues.*

LA. CODE EVID. ANN. art 407 cmt. (b) (1988) (emphasis added).

57. 507 So. 2d 809, 818 (La. 1987).

58. *Id.* at 816. *See, e.g.*, Givens v. DeSoto Bldg. Co., 100 So. 534 (La. 1924); Galloway v. Employers Mut. of Wausau, 286 So. 2d 676 (La. App. 4th Cir.), *writ denied*, 290 So. 2d 333 (La. 1974); Currier v. Saenger Theaters Corp., 10 So. 2d 526 (La. App. 1st Cir. 1942).

design or a warning.[59] The court acknowledged that three Louisiana courts previously excluded post-accident evidence that a product was defective.[60] Nevertheless, citing *Fontenot v. F. Hollier & Sons*,[61] the court asserted that evidence of such changes was admissible if the underlying issue was failure to warn.[62] The court unilaterally avowed that the policy considerations that motivated the exclusion of evidence of remedial measures were irrelevant when the underlying theory was strict liability.[63] As justification, the court cited three federal Eighth Circuit decisions and a California Supreme Court decision, all of which held that the policy factors compelling exclusion of evidence of remedial measures did not pertain to cases involving strict liability.[64] Relying on these outside courts' assessments of policy considerations, the Louisiana Supreme Court asserted that evidence of subsequent remedial measures should be admitted.

Although article 407 had not been enacted at the time of the decision, the court proclaimed that this interpretation was consistent with the Proposed Code of Evidence and prior Louisiana jurisprudence.[65] The court justified its position by alleging that any possible deterrent effect resulting from the decision would be mitigated by the affirmative defense of scientific unknowability available to a manufacturer in failure to warn, alternative design, and alternative product cases.[66] The court felt that this defense

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59. *Toups*, 507 So. 2d at 818.

60. *Id.*

61. 478 So. 2d 1379 (La. App. 3d Cir. 1985), *aff'd sub nom*, Lafleur v. John Deere Co., 491 So. 2d 624 (La. 1986).

62. *Toups*, 507 So. 2d at 818. See sources cited *supra* note 45 for a discussion of the current standard for culpability predicated on a failure to warn under the LPLA.

63. *Toups*, 507 So. 2d at 818.

64. *Id. See* Unterburger v. Snow Co., 630 F.2d 599 (8th Cir. 1980); Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmer's Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977); Ault v. Int'l Harvester Co., 528 P.2d 1148 (Cal. 1974).

65. *Toups*, 507 So. 2d at 818.

66. *Id.* at 817 (citing Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 118 (La. 1986), *superseded by statute*, LA. REV. STAT. ANN. § 9:2800.51 (1988)). The State of the Art defense is an affirmative defense provided by the LPLA, explained in Louisiana Revised Statutes Section 9:2800.59:

> Notwithstanding R.S. 9:2800.56, a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product's design if the manufacturer proves that, at the time the product left his control:
>
> He did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the design characteristic that caused the damage or the danger of such characteristic; or

would combat the possible deterrent effects resulting from its refusal to extend the subsequent remedial measures rule to products liability cases.[67]

Thus, the Louisiana Supreme Court compensated for the legislative silence in article 407 by holding that the subsequent remedial measures rule is inapplicable when the underlying theory of culpability is strict products liability. Although critics have condemned *Toups* since its announcement,[68] the decision has not been disturbed by subsequent jurisprudence, despite evolving trends at the federal level and changes in Louisiana products liability law.

C. The Current State of the Louisiana Products Liability Act

The legislature enacted the Louisiana Products Liability Act ("LPLA") in 1988 to create the exclusive theories of liability for manufacturers when a product causes damage.[69] Consequently, a claimant cannot bring an action against a manufacturer for damage caused by a product under any theory of liability not included under the Act.[70] The manufacturer is liable for damage caused by an "unreasonably dangerous" characteristic of the product if the damage arose from a "reasonably anticipated use," and this characteristic either existed at the time the product left the manufacturer's control or resulted from a "reasonably anticipated

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> He did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design identified by the claimant under R.S. 9:2800.56(1); or
> The alternative design identified by the claimant under § 9:2800.56(1) was not feasible, in light of then-existing economic particularity.
> Notwithstanding R.S. 9:2800.57(A) or (B), a manufacturer of a product shall not be liable for damage proximately caused by a characteristic of the product if the manufacturer proves that, at the time the product left his control, he did not know and, in light of then-existing reasonably available scientific and technological knowledge, could not have known of the characteristic that caused the damage or the danger of such characteristic.

LA. REV. STAT. ANN. § 9:2800.59 (2005).

67. Rabalais, *supra* note 9, at 1002. Commentators criticize the *Toups* court's use of the affirmative defense as a justification for admitting evidence of subsequent remedial measures. *See, e.g., id.*

68. *See* sources cited *supra* note 9.

69. LA. REV. STAT. ANN. § 9:2800.52 (2005).

70. *Id.*

alteration or modification of the product."[71] The legislature further explicated the four ways a product may be considered unreasonably dangerous: unreasonably dangerous in construction or composition,[72] unreasonably dangerous in design,[73] unreasonably dangerous due to the manufacturer's failure to provide an adequate warning,[74] and the failure to conform to an express warranty about the product.[75]

In expressly establishing the exclusive theories for liability against a manufacturer in a products liability action, the LPLA effectively deleted the general negligence claim against a manufacturer.[76] Nevertheless, aspects of negligence and strict liability survived and are evident through the theories of liability sanctioned by the LPLA.[77]

III. ANALYSIS: THE TIME IS RIPE FOR REEVALUATION OF LOUISIANA'S INTERPRETATION OF ARTICLE 407

Louisiana Code of Evidence article 407 demands reevaluation. Writers have advanced numerous criticisms and condemnations of the article itself, as well as attacks on the jurisprudential interpretation of the provision.[78] Louisiana should modernize its position to include products liability within the scope of the subsequent remedial measures rule. Times have changed since its enactment and interpretation, as evidenced by the amendment to the federal rule to provide for products liability.

A. The Substance of Article 407 Is Silent As to Its Application to Products Liability

Article 407 is silent as to its applicability to products liability cases. The comments to the article state that "[p]rior Louisiana law was generally in accord with this article," pointing the reader

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71. Maraist & Galligan, *supra* note 29, at § 15-4 (citing LA. REV. STAT. ANN. § 9:2800.54 (2005)).

72. LA. REV. STAT. ANN. § 9:2800.55 (2005).

73. *Id.* § 9:2800.56.

74. *Id.* § 9:2800.57.

75. *Id.* § 9:2800.58.

76. Maraist & Galligan, *supra* note 29, at § 15-4. The authors note that "[b]ecause the LPLA makes these the only theories of recovery available against a manufacturer for damages caused by its products, the two obvious casualties of the LPLA are the general negligence action against the manufacturer and *Halphen*'s unreasonably dangerous *per se* theory." *Id.*

77. *Id.*; Kennedy, *supra* note 45, at 589–90.

78. *See* sources cited *supra* note 9.

to four cases.[79] These cases, however, do not support the statement that admitting evidence of subsequent remedial measures in products liability actions is supported by Louisiana law.[80] While establishing that such evidence is inadmissible to prove negligence or culpable conduct, the cited cases do not discuss whether subsequent remedial measures are admissible as evidence on other occasions.[81]

Two of these cases, *Givens v. DeSoto Building Co.*[82] and *Currier v. Saenger Theaters Corp.*,[83] simply articulate the general rule excluding evidence of subsequent remedial measures.[84] Moreover, a close reading of *Gauche v. Ford Motor Co.*[85] and *Galloway v. Employers Mutual*,[86] also referenced in the comments to article 407, suggests a contrary application of the rule.[87] Although admissibility in products liability was not addressed specifically by the Louisiana Fourth Circuit in these decisions, if decided today, they would be grounded in products liability.[88] The cases cited in the comments to article 407 reflect prior Louisiana law as it pertains to negligence. Consequently, these decisions cannot be relied upon as authority for carving out an exception to the general exclusionary rule for products liability.

B. Problems with the Jurisprudential Interpretation of Article 407: Toups v. Sears, Roebuck & Co.

Since it was announced, doctrinal writers have condemned the *Toups* decision and have presented numerous reasons to undermine its authority.[89] Critics have repeatedly questioned the Louisiana Supreme Court's injection of the federal minority position on this issue into Louisiana law.[90]

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79. LA. CODE EVID. ANN. art. 407 cmt. (a) (1988) (citing Givens v. DeSoto Bldg. Co., 100 So. 534 (La. 1924); Galloway v. Employers Mut. of Wausau, 286 So. 2d 676 (La. App. 4th Cir.), *writ denied*, 290 So. 2d 333 (La. 1974); Gauche v. Ford Motor Co., 226 So. 2d 198 (La. App. 4th Cir. 1969); Currier v. Saenger Theaters Corp., 10 So. 2d 526 (La. App. 1st Cir. 1942)).

80. Rabalais, *supra* note 9, at 997.

81. *Id.*

82. 100 So. 534 (La. 1924).

83. 10 So. 2d 526 (La. App. 1st Cir. 1942).

84. Richards, *supra* note 9, at 451.

85. 226 So. 2d 198 (La. App. 4th Cir. 1969).

86. 286 So. 2d 676 (La. App. 4th Cir.), *writ denied*, 290 So. 2d 333 (La. 1974).

87. Rabalais, *supra* note 9, at 997 n.71.

88. *Id.*

89. *See* sources cited *supra* note 9.

90. Garner, *supra* note 9, at 667.

Specifically, the Louisiana Supreme Court relied on external authority to corroborate its interpretation of the subsequent remedial measures rule, but the position adopted by the court followed the minority view, supported at that time only by the federal Eighth and Tenth Circuits.[91] Moreover, the court failed to mention contrary interpretations of Louisiana's model—Federal Rule of Evidence 407.[92] The court's analysis completely ignored the dominant federal attitude at the time, which included strict and products liability cases within the subsequent remedial measures rules.[93] In fact, the court failed to acknowledge the existence of a contrary position at all.[94] Without offering an explanation or justification, the court declared evidence of subsequent remedial measures admissible in strict products liability actions.[95]

The Louisiana Supreme Court's declaration that admitting this evidence in products liability cases was consistent with prior Louisiana jurisprudence further discredits the decision. Instead, the court failed to accurately follow the precedent established by prior decisions.

The court began its discussion by correctly asserting that Louisiana embraces the exclusionary rule in negligence actions, acknowledging the possible deterrent effects of allowing evidence of remedial measures.[96] The Louisiana Supreme Court officially adopted this general rule in *Givens v. De Soto Building Co.*[97] As justification, the *Givens* court asserted that allowing evidence of subsequent remedial measures would effectively serve as a penalty against the accused,[98] rendering the individual less motivated to implement remedial changes because he fears legal repercussions. Thus, admitting post-accident modifications as evidence of liability prevents society from modernizing with changes in technology and

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91. *See, e.g.*, Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1331 (10th Cir. 1983); Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980).

92. Garner, *supra* note 9, at 666.

93. *Id.*

94. *See* Toups v. Sears, Roebuck & Co., 507 So. 2d 809, 816 (La. 1987) ("The policy considerations which exclude evidence of remedial measures in negligence cases are not applicable where strict liability is involved."). Without an explanation, the court simply cited three Eighth Circuit cases and a California Supreme Court case that recognized the minority position at the time of *Toups*. *See Unterburger*, 630 F.2d 599; Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788 (8th Cir. 1977); Ault v. Int'l Harvester Co., 528 P.2d 1148 (Cal. 1974).

95. *Toups*, 507 So. 2d at 816.

96. *Id.*

97. 100 So. 534, 535 (La. 1924).

98. *Id.* ("[I]f the evidence is competent, it operates as a confession that he was guilty of prior wrong.").

learning from experience.[99] The *Givens* rule was reinforced in *Currier v. Saenger Theaters Corp.*, a case in which the Louisiana First Circuit held that the repair of a carpet following an injury was "without probative value to show negligence," concluding that "by the decided weight of authority, the proof of such a fact is irrelevant and inadmissible."[100] Additionally, Louisiana courts held evidence of a recall irrelevant in establishing negligence.[101]

The *Toups* decision invited criticism by removing products liability and strict liability from the general rule.[102] At the time of *Toups*, Louisiana jurisprudence had not created an exception for strict liability.[103] Not only had Louisiana courts failed to carve out an exception for strict products liability from the subsequent remedial measures rule, but the highest court in Louisiana had never before addressed the issue. On the contrary, the court uniformly denied writs when confronted with the question of admissibility in products liability suits.[104]

Although lower courts included products liability within the general rule, these decisions were not mentioned in *Toups*. In *Lovell v. Earl Grissmer Co.*, the Louisiana First Circuit held that evidence of a post-accident change offered by the plaintiff in an effort to prove a product defect was not logically or legally relevant.[105] The first circuit reasoned that the change simply may have been motivated by a desire to make the product "totally innocuous," though it previously presented no unreasonable risk of harm.[106] Ultimately, the first circuit regarded the subsequent remedial measures rule and its rationale as equally applicable both to manufacturers and negligent tortfeasors.[107]

Other lower court decisions similarly included products liability actions within the scope of the subsequent remedial measures rule. In *Smith v. Formica Corp.*, the first circuit deemed post-accident federal regulatory changes to a warning label irrelevant in proving that a defect existed at the time of injury.[108] In declaring post-accident changes inadmissible in a failure to

99. Rabalais, *supra* note 9, at 993.
100. Currier v. Saenger Theaters Corp., 10 So. 2d 526, 527 (La. App. 4th Cir. 1942).
101. *See, e.g.*, Gauche v. Ford Motor Co., 226 So. 2d 198, 211 (La. App. 4th Cir. 1969).
102. Toups v. Sears, Roebuck & Co., 507 So. 2d 809, 816 (La. 1987).
103. Bienvenu, *supra* note 9, at 1081.
104. Rabalais, *supra* note 9, at 994 n.51.
105. 422 So. 2d 1344, 1349 (La. App. 1st Cir. 1982), *writ denied*, 427 So. 2d 871 (La. 1983).
106. *Id.*
107. Richards, *supra* note 9, at 453.
108. 439 So. 2d 1194, 1200 (La. App. 1st Cir. 1983).

warn case, the Louisiana Third Circuit added, "[I]t is apparent . . . that Louisiana courts are not completely convinced that a products liability exception should be created."[109]

Without acknowledging any of these cases, the *Toups* court cited *Fontenot* for the proposition that "on the issue of failure to warn, such evidence has been admitted."[110] Ironically, the *Toups* court did not discuss the case or its rationale.[111] In reality, the authority cited by the Louisiana Supreme Court is hollow because the case proffered a narrow holding that is easily distinguishable from *Toups*.

In *Fontenot*, the Louisiana Supreme Court noted that evidence of post-accident changes is generally inadmissible.[112] Nevertheless, "under the facts of this case," admission was proper, for the measures were not deemed post-injury modifications but evidence necessary to illustrate pre-injury changes.[113] The admissibility of subsequent remedial measures as evidence of liability, therefore, was not an issue before the court in *Fontenot*.[114] Since the holding is distinguishable, the strength of its authority is weakened considerably. As a result, the *Toups* decision represented a break from prior Louisiana jurisprudence, which had not excluded products liability from the general rule since its formal adoption in *Givens*.[115]

As an additional criticism, one writer condemned the court's reliance on the Proposed Louisiana Code of Evidence as a justification for reversing prior jurisprudence.[116] As it had not been adopted at the time of the decision, proposed article 407 was not the law in Louisiana at the time.[117] The court incorrectly cited *Fontenot* to support its argument that the article reflected Louisiana law. In so holding, the court officially sanctioned a proposed article which would change Louisiana's evidentiary standards in products liability without adequately explaining its reasoning.[118] Furthermore, the proposed article alone does not justify the court's holding with regards to products liability

109. Mobley v. Gen. Motors Corp., 482 So. 2d 1056 (La. App. 3d Cir.), *writ denied*, 486 So. 2d 735 (La. 1986).
110. Toups v. Sears, Roebuck & Co., 507 So. 2d 809, 816 (La. 1987).
111. Richards, *supra* note 9, at 458.
112. Fontenot v. F. Hollier & Sons, 478 So. 2d 1379, 1388 (La. App. 3d Cir. 1985), *aff'd sub nom*, Lafleur v. John Deere Co., 491 So. 2d 624 (La. 1986).
113. *Id.*
114. Rabalais, *supra* note 9, at 1000.
115. Richards, *supra* note 9, at 459.
116. *Id.*
117. *Id.* at 460.
118. *Id.*

because it solely discusses "negligence or culpable conduct," never mentioning strict or products liability.[119]

C. Times are Changing—Louisiana Should Follow the Federal Trend in Excluding Evidence of Subsequent Remedial Measures in Products Liability Cases

In addition to the numerous problems arising from the *Toups* court's interpretation of article 407, changes in the federal treatment of the subsequent remedial measures rule necessitate reevaluation of Louisiana's position. In 1997, Congress amended Federal Rule of Evidence 407 to provide an explicit answer to the question of whether the rule applies to products liability, thereby officially resolving the dispute among the federal circuits. In addition to evidence of subsequent remedial measures being inadmissible to prove negligence or "culpable conduct," Congress added that such evidence is barred when establishing "a defect in a product, a defect in a product's design, or a need for a warning or instruction."[120] The Advisory Committee's Note acknowledges the importance of this amendment, explaining that Congress "adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions."[121] Furthermore, at the time of the proposal, many states paralleled federal jurisprudence, similarly construing their respective rules to exclude evidence in negligence and strict liability actions.[122] An analysis of trends in the various states reveals that states are amending their respective

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119. *Id.* at 462.

120. FED. R. EVID. 407.

121. FED. R. EVID. 407 advisory committee's note (1997) (citing Joint E. Dist. & S. Dist. Asbestos Litig. v. Armstrong World Indus., Inc., 995 F.2d 343 (2d Cir. 1993); Kelly v. Crown Equip. Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); Gauthier v. AMF, Inc., 788 F.2d 634, 636–37 (9th Cir. 1986); Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984); Grenada Steel Indus., Inc. v. Ala. Oxygen Co., 695 F.2d 883 (5th Cir. 1983); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981); Werner v. Upjohn Inc., 628 F.2d 848 (4th Cir. 1980); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980)).

122. *See, e.g.*, First Premier Bank v. Kolkraft Enters., 686 N.W.2d 430, 451 (S.D. 2004); Hyjek v. Anthony Indus., 944 P.2d 1036, 1039, 1042–43 (Wash. 1997); Cyr v. J.I. Case Co., 652 A.2d 685, 693 (N.H. 1994); Krause v. Am. Aerolights, Inc., 762 P.2d 1011, 1013 (Or. 1988); Kallio v. Ford Motor Co., 407 N.W.2d 92, 97–98 (Minn. 1987); Rix v. Gen. Motors Corp., 723 P.2d 195, 202 (Mont. 1986); Hallmark v. Allied Prod. Corp., 646 P.2d 319, 325–26 (Ariz. 1982).

subsequent remedial measures rules to provide for exclusion in products liability cases.[123]

The comments to Louisiana Code of Evidence article 407 proclaim that the article "generally follows" the federal rule.[124] The Louisiana Supreme Court reiterated this statement, pointing to the nearly identical language in the federal rule and the proposed Louisiana article.[125] However, despite the initial desire to follow the federal rule, Louisiana has not similarly amended its article to provide for products liability, nor have the courts altered their interpretation to extend article 407 to products liability actions.

Prior to the federal amendment, the Louisiana Supreme Court discussed the *Toups* decision in *Northern Assurance Co. v. Louisiana Power & Light Co.*[126] In analyzing whether the plaintiff could introduce photographic evidence taken after an injury, the court credited *Toups* for establishing that evidence of subsequent remedial measures was admissible in a products liability action to determine what the manufacturer knew or should have known.[127]

In *Shaw v. Fidelity & Casualty Insurance Co.*, the second circuit explained that article 407 only applied to a cause of action predicated on a theory of negligence or culpable conduct.[128] Citing *Toups*, the court maintained that in a strict products liability action, evidence of subsequent remedial measures was crucial to determine what the manufacturer knew or should have known.[129] Subsequent appellate decisions similarly relied on *Toups* as authority for this restrictive interpretation of article 407.[130]

The most recent Louisiana Supreme Court decision mentioning *Toups* was announced in 1994, prior to the federal amendment to Rule 407.[131] The only appellate decisions citing *Toups* since the amendment cited the case on other grounds. The Louisiana Fourth

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123. *See, e.g.*, Carver, *supra* note 36, at 590; Thomas S. Stewart & Stacy M. Andreas, *Subsequent Remedial Measures: An Analytical Model for Product Liability Cases*, 26 TORT TRIAL & INS. PRAC. L.J. 74 app. II (1990).

124. LA. CODE EVID. ANN. art. 407 cmt. (a) (1988).

125. *See* N. Assurance Co. v. La. Power & Light Co., 580 So. 2d 351, 357 n.6 (La. 1991) (discussing the policy implications cited in Rule 407) ("The Louisiana Code of Evidence . . . uses almost identical language pertaining to evidence of subsequent remedial measures. The comment to the Code states that prior Louisiana law was generally in accord with this article.").

126. *Id.* at 357.

127. *Id.* (citing Toups v. Sears, Roebuck & Co., 507 So. 2d 809, 816–17 (La. 1987)).

128. 582 So. 2d 919, 924 (La. App. 2d Cir. 1991).

129. *Id.*

130. *See, e.g.*, Rivnor Prop. v. Herbert O'Donnell, Inc., 633 So. 2d 735, 745 (La. App. 5th Cir.), *writ denied*, 643 So. 2d 147 (La. 1994).

131. *See* Hines v. Remington Arms Co., 648 So. 2d 331, 341 (La. 1994).

Circuit declined to extend *Toups* and distinguished the case, but this negative history arose on grounds other than the treatment of article 407.[132] The only appellate decisions that cited *Toups* since the federal amendment are negligible to this analysis because one referenced the case on other grounds[133] and the other made no mention of products liability.[134] Therefore, it is possible to assume that the Louisiana Supreme Court will alter its application of article 407 if presented with the issue after the federal amendment.

IV. LOUISIANA SHOULD ADOPT THE FEDERAL POSITION

Upon reevaluation of article 407, the Louisiana Legislature must adopt the federal position. The current provision, which allows the use of subsequent remedial measures as evidence, encourages prejudicial inferences of guilt with weak probative value.[135] In this area, a strong social policy encouraging progression toward a safer environment collides with these weak inferences of guilt to mandate exclusion of evidence.[136] In addition to being logically and legally irrelevant to a determination of fault,[137] the admission of evidence of subsequent remedial measures tends to confuse jurors assessing liability[138] and to promote forum shopping.[139]

A. Reliance on the 401/403 Balance is Unnecessary and Contrary to Legislative Intent

Code of Evidence articles 401 and 403 serve as the "cornerstone" of the Code and the "foundation" that supports the other provisions.[140] Article 401 defines "relevant evidence,"[141]

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132. *See* Chauvin v. Sisters of Mercy Hosp. Sys., St. Louis, Inc., 818 So. 2d 833 (La. App. 4th Cir.), *writ denied*, 825 So. 2d 1194 (La. 2002); Maher v. Costa Lines Cargo Serv., Inc., 691 So. 2d 1303 (La. App. 4th Cir.), *writ denied*, 695 So. 2d 985 (La. 1997).

133. *See* Hesse v. Champs Serv. Line, 758 So. 2d 245, 249 (La. App. 3d Cir. 2000).

134. Conques v. Wal-Mart Stores, Inc., 779 So. 2d 1094 (La. App. 3d Cir.), *writ denied*, 790 So. 2d 643 (La. 2001).

135. Hoffman & Zuckerman, *supra* note 12, at 508.

136. FED. R. EVID 407 advisory committee's note (1972).

137. *See* Hoffman & Zuckerman, *supra* note 12, at 508.

138. Matthew L. Kimball, *The Admissibility of Subsequent Remedial Measures in Strict Liability Actions: Some Suggestions Regarding Federal Rule of Evidence 407*, 39 WASH. & LEE L. REV. 1415, 1419 (1982).

139. Bienvenu, *supra* note 9, at 1082.

140. Gerard A. Rault, *An Overview of the New Louisiana Code of Evidence—Its Imperfections and Uncertainties*, 49 LA. L. REV. 697, 704 (1989).

while article 403 presents a balancing test to determine whether the disputed evidence should be excluded.[142] Under this test, "relevant" evidence may be excluded if certain enumerated dangers substantially outweigh its probative worth, specifically the dangers of "unfair prejudice, confusion of the issues, or misleading the jury."[143]

The comments to article 403 explain that the "401/403 balance" is used only if the issue is not expressly provided for in articles 404 through 413.[144] Consequently, the existence of article 407 renders evidence of subsequent remedial measures outside the parameters of the balance.[145] The per se exclusion of subsequent remedial measures as evidence is not surprising; such evidence generally is considered unreliable and condemned as "unfairly prejudicial" with "little probative value."[146] Therefore, through article 407, the Louisiana Legislature has already spoken on the relevance of evidence of subsequent remedial measures.

In Louisiana's Code of Evidence, the legislature did not explain whether products liability fell within the scope of article 407. Arguably, the legislature's balance is applicable to all attempts to introduce evidence of subsequent remedial measures as evidence of fault. Moreover, relying on the 401/403 balancing test is not an adequate solution to fill the void left by the legislative silence in the article. One writer argues that exclusion of evidence of subsequent remedial measures should be categorical, rather than performed on a case-by-case basis when the time of determining

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141. "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." LA. CODE EVID. ANN. art. 401 (2005).

142. LA. CODE EVID. ANN. art. 403 (2005). *See also* Frank L. Mariast, EVIDENCE & PROOF § 5.1, *in* 19 LOUISIANA CIVIL LAW TREATISE 65–66 (1999); Rault, *supra* note 140, at 705.

143. LA. CODE EVID. ANN. art. 403 (2005).

144. LA. CODE EVID. ANN. art. 403 cmt. (b) (1988).

145. Michael W. Blanton, *Application of the Federal Rule of Evidence 407 in Strict Products Liability Cases: The Evidence Weighs Against Automatic Exclusion*, 65 UMKC L. REV. 49, 60 (1996) ("Because subsequent remedial measures evidence would generally meet the liberal relevance standard of Rule 401, despite its weak probative value in proving negligence, Rule 407 can be viewed as bypassing the general relevancy determination made under Rule 403 and automatically excluding minimally relevant evidence."). This argument can be extended to Louisiana Code of Evidence articles 401 and 403, as the comments to both clarify that they are "based on" and "generally follow" Federal Rules of Evidence 401 and 403, respectively. *See* LA. CODE EVID. ANN. art. 401 cmt. (a) (1988), *and* LA. CODE EVID. ANN. art. 403 cmt. (a) (1988).

146. Weinstein & Berger, *supra* note 23, at § 407.03[2].

liability is the time of distribution,[147] as it is in Louisiana under the LPLA. Another scholar cites the need for predictability as a strong reason supporting exclusion of subsequent remedial measures evidence.[148]

The dangers of "confusion of the issues, or misleading the jury,"[149] which prompted the legislature to categorically exclude evidence of subsequent remedial measures from the 401/403 inquiry, prejudice the defendant, regardless of whether the subsequent repair evidence is being used in a negligence or product liability case.[150] Louisiana cannot rely upon judges to exclude evidence of subsequent remedial measures utilizing the balance alone because judges tend to favor admitting evidence when confronted with questions of relevance and unfair prejudice.[151] Thus, in addition to being superseded by legislative fiat through article 407, relying on the 401/403 balance to determine admissibility is insufficient in effectively excluding evidence that warrants exclusion.

B. The Collision of a Strong Social Policy and Weak Inferences of Guilt Mandates Exclusion of Evidence of Subsequent Remedial Measures

Congress affirmatively declared in the Advisory Committee's Note to Federal Rule of Evidence 407 that conduct is not an admission of fault.[152] Because such conduct is equally consistent with injury by accident or through contributory fault, remedial acts taken after an accident have little probative worth as evidence, and the inferences associated with such evidence may be strong or weak depending upon the circumstances.[153] Regardless of the relative weakness of such inferences, the Advisory Committee deemed the social policy of encouraging additional safety measures to be the "more impressive" grounds for exclusion.[154] The Louisiana Legislature cited identical policy concerns in enacting the Louisiana Code of Evidence.[155]

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147. Burns, *supra* note 34, at 1171.
148. Bienvenu, *supra* note 9, at 1082.
149. LA. CODE EVID. ANN. art. 403 (2005).
150. Burns, *supra* note 34, at 1171.
151. Kimball, *supra* note 138, at 1434.
152. FED. R. EVID 407 advisory committee's note (1972).
153. *Id. See also* Maraist, *supra* note 142, at § 5.3, at 77–78.
154. FED. R. EVID 407 advisory committee's note (1972).
155. 1988 La. Sess. Law Serv. 515 (West). The comments to article 407 state in pertinent part:

1. Relevancy

The current position of article 407 encourages the trier of fact to make "inferences upon inferences," a practice that undermines the probative value of the evidence. While drawing inferences from evidence is a reality, the fewer inferences drawn to reach a conclusion, the greater the probative worth of the evidence.[156] Using changes implemented after an accident or injury as evidence of fault requires sequential inferences, which are typically weak inferences of the manufacturer's negligence or the product's defectiveness.[157] Realistically, numerous motives potentially could have inspired the particular repair. Thus, admitting evidence of the change encourages the trier of fact to infer the existence of negligence or a defect, although neither condition can be established convincingly from this circumstantial evidence.[158]

a. Evidence of Subsequent Remedial Measures Is "Logically and Legally Irrelevant" in Establishing Fault in Products Liability

Evidence of post-accident repairs and changes are "at best, ambiguous and should be excluded."[159] Exclusion is predicated on the understanding that a jury generally construes the act as an admission, when in reality it is not.[160] Admitting evidence of subsequent remedial measures encourages the inference that "[i]f the product wasn't broke, why did [d]efendant fix it?"[161] In addition, parties erroneously infer antecedent negligence from the evidence, claiming that the subsequent installation of these measures indicates

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> The major policy ground for this exclusion is the goal of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety . . . . A second policy reason is that the fact of the subsequent repair or improvement is often ambiguous, and raises inferences unrelated to the negligence issue as strong as or stronger than the inference of consciousness of negligence . . . . Thus, many improvements simply reflect developing technology or are initiated for economic reasons.

LA. CODE EVID. ANN. art. 407 cmt. (c) (1988).

156. *See* Burns, *supra* note 34, at 1165.

157. *Id.*

158. *Id.*

159. Hoffman & Zuckerman, *supra* note 12, at 508.

160. *Id.*

161. John M. Kobayashi, *Subsequent Remedial Measures and Recall Letters and Notices*, 379 PLI/LIT 503, 575 (1989).

changes the defendant "should have" implemented before the accident or injury.[162]

Scholars argue that "[i]t is the rare manufacturer that isn't constantly changing and improving its product or the consumer's understanding of it"; therefore, standing alone, the modification does not reveal substantial insight about the conduct or product at the time of the accident.[163] The Practicing Law Institute cautions: "These inferences overlook a variety of critical distinctions including the situations where a product was not defective but could have been made better, or where new technology or abundance of caution prompted the subsequent remedial measure."[164] Consequently, the use of the subsequent remedial measures as evidence is "always prejudicial and rarely probative."[165]

b. Including Products Liability Within the Scope of Article 407 Is Consistent with the Louisiana Products Liability Act

Holding evidence of subsequent remedial measures inadmissible in products liability suits is consistent with the current state of the LPLA. Scholars agree that the LPLA straddles the theories of negligence and strict liability.[166] Consequently, the expansion of article 407 to provide for products liability does not necessitate an amendment to Louisiana's Code of Evidence. Such an interpretation is consistent with the legislative intent to bar the use of remedial measures as evidence of "negligence and culpable conduct."

While the comments to article 407 reinforce the limitation of the rule to cases grounded in negligence and culpable conduct, the legislature did not define these categories or expressly exclude products liability from falling within either category.[167] The LPLA explicitly states that "[c]onduct or circumstances that result in liability under this Chapter are 'fault' within the meaning of Louisiana Civil Code article 2315."[168] Thus, an action under the LPLA is analogous to an ordinary tort under article 2315.[169] Violating the legal duty

162. *Id.*
163. Hoffman & Zuckerman, *supra* note 12, at 508.
164. Kobayashi, *supra* note 161, at 575.
165. Hoffman & Zuckerman, *supra* note 12, at 508.
166. *See, e.g.*, Bienvenu, *supra* note 9, at 1079; Kennedy, *supra* note 45, at 589–90.
167. Bienvenu, *supra* note 9, at 1077 (discussing LA. CODE EVID. ANN. art. 407 cmt. (b) (1988)).
168. LA. REV. STAT. ANN. § 9:2800.52 (2005); Bienvenu, *supra* note 9, at 1078.
169. *See* LA. CIV. CODE ANN. art. 2315 (2005) ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.").

imposed by the Act constitutes "fault" under Louisiana tort doctrine, enabling fault under the LPLA to be classified as "culpable conduct."[170] A further indication that LPLA liability falls within "culpable conduct" is the fact that victim fault may be offered as a defense in negligence and also in cases falling under the LPLA. This similarity creates additional ambiguities in attempting to distinguish between theories of liability for the purposes of exclusion.[171]

One observer argues that the relevancy of subsequent remedial measures evidence in a given jurisdiction turns on the time designated by substantive law for determining liability.[172] Under the LPLA, the manufacturer is liable for damages caused by the product "at the time the product left his control."[173] Therefore, only evidence revealing qualities of the product up to and including the time in which it left the manufacturer's control is relevant in assessing liability.[174] Admitting evidence of subsequent remedial actions, deemed irrelevant by the substantive law creating liability, threatens to expand the scope of liability by essentially holding the manufacturer responsible for knowledge declared irrelevant through the adoption of the LPLA.[175]

c. Admitting Evidence of Subsequent Remedial Measures Promotes Inferences of Guilt of Varying Strengths and Weaknesses Under the Different Theories of the LPLA

The LPLA provides the exclusive theories of liability when a product causes damage. The theories of products liability enumerated in the LPLA are: (1) unreasonably dangerous in construction or composition; (2) unreasonably dangerous in design; (3) unreasonably dangerous due to inadequate warning; and (4) failure to conform to an express warranty. Under each theory, allowing evidence of subsequent remedial measures to be considered when assessing fault promotes weak inferences of the manufacturer's negligence or the product's defectiveness.

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170. Bienvenu, *supra* note 9, at 1079 ("Black's Law Dictionary defines 'culpable conduct' as synonymous with 'blameable' conduct or conduct 'involving the breach of a legal duty of the commission of a fault.' In Louisiana, the Civil Code sets forth the basis of Louisiana's system of 'fault' in the broadest of terms."). *See* BLACK'S LAW DICTIONARY 341 (5th ed. 1979).

171. *See* Bienvenu, *supra* note 9, at 1079. *See also* LA. CIV. CODE ANN. art. 2323 (2005); Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985).

172. Burns, *supra* note 34, at 1146.

173. *See* LA. REV. STAT. ANN. § 9:2800.55 (2005); *id.* § 9:2800.56; *id.* § 9:2800.57; *id.* § 9:2800.59.

174. Burns, *supra* note 34, at 1170.

175. *Id.* at 1171–72.

i. Unreasonably Dangerous in Construction or Composition

Under the LPLA, a product is unreasonably dangerous in construction or composition if it deviated from the manufacturer's specifications or standards in a material way at the time the product left the manufacturer's control.[176] Liability arises when a mistake in the manufacturing process produces a substandard product.[177] Therefore, the plaintiff must prove that the flaw existed at distribution and that the flaw caused the damage.[178] The claimant is not required to prove knowledge on the part of the manufacturer, which renders an analysis of what the manufacturer knew or should have known irrelevant.[179] Thus, under the LPLA, evidence of subsequent remedial measures is irrelevant in establishing liability due to a defect in construction or composition.

ii. Unreasonably Dangerous in Design

Through Louisiana Revised Statutes Section 2800.56, the legislature created the elements for establishing that a product is unreasonably dangerous in design. A manufacturer is liable under this theory if, at the time the product left his control, there existed an alternative design for the product that was capable of preventing the damage caused.[180] Additionally, the plaintiff must prove that, at the time of distribution, the likelihood that the product as designed would cause the damage and the severity of the damage outweighed both the burden of implementing the alternative design and the possible adverse effects on utility resulting from adopting the alternative design.[181] To impose liability, the characteristic of the product that rendered it unreasonably dangerous must exist at the time of distribution or result from a reasonably anticipated alteration of the product.[182] Therefore, evidence of post-accident repairs only raises prejudicial inferences about the condition of the product at the time it left the manufacturer's control, without establishing actual knowledge on the part of the manufacturer at the time of distribution.

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176. LA. REV. STAT. ANN. § 9:2800.55 (2005).
177. Kennedy, *supra* note 45, at 593.
178. Maraist & Galligan, *supra* note 29, at § 15.9.
179. Kennedy, *supra* note 45, at 594 (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965)).
180. LA. REV. STAT. ANN. § 9:2800.56 (2005); Kennedy, *supra* note 45, at 596.
181. Kennedy, *supra* note 45, at 596.
182. LA. REV. STAT. ANN. § 9:2800.54(C) (2005).

iii. Affirmative Defenses

Through Louisiana Revised Statutes Section 9:2800.59, the LPLA provides the manufacturer with state-of-the-art affirmative defenses to rebut the plaintiff's prima facie case alleging that the product was unreasonably dangerous in design.[183] To present a prima facie case, the plaintiff must establish that an alternative design existed at the time the product left the manufacturer's control.[184] The LPLA exculpates a manufacturer if he can prove that "in light of reasonably available scientific and technological knowledge [he] could not have known of the design characteristic that caused the damage or the danger of such characteristics."[185] The provision provides a second affirmative defense that relieves the manufacturer of liability if he can prove that "in light of then-existing reasonably available scientific and technological knowledge [he] could not have known of the alternative design identified by the claimant . . . ."[186] Finally, the third affirmative defense allows the manufacturer to escape liability by proving that the "alternative design identified by the claimant . . . was not feasible, in light of then-existing reasonably available scientific and technological economic practicality."[187]

While evidence of subsequent remedial measures should be excluded in products liability cases, the use of the statutorily-provided affirmative defenses to rebut the plaintiff's prima facie case should render such evidence admissible. Use of the affirmative defenses is analogous to the exceptions listed in the federal and Louisiana provisions regarding "ownership, authority, knowledge, control, or feasibility of precautionary measures,"[188] which effectively controvert the issue. The federal Fourth Circuit Court of Appeals recognized that "[e]xceptions must arise where defendant attempts to make offensive use of the exclusion of [the] evidence."[189] Similarly, in rebutting the plaintiff's prima facie case by alleging lack of knowledge or feasibility, the evidence of subsequent remedial measures should be admissible, as it is when controverted under the federal rule.

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183. Maraist & Galligan, *supra* note 29, at § 15-10(e) (citing LA. REV. STAT. ANN. § 9:2800.59 (2005)).

184. LA. REV. STAT. ANN. § 9:2800.56(1) (2005); Maraist & Galligan, *supra* note 29, at § 15-10(b).

185. Maraist & Galligan, *supra* note 29, at § 15-10(e) (citing LA. REV. STAT. ANN. § 9:2800.59(A)(1) (2005)).

186. *Id.* (citing LA. REV. STAT. ANN. § 9:2800.59(A)(2) (2005)).

187. *Id.* (quoting LA. REV. STAT. ANN. § 9:2800.59(A)(3) (2005)).

188. LA. CODE EVID. ANN. art. 407 (2005).

189. Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980).

iv. Unreasonably Dangerous Because of an Inadequate Warning

Finally, a product may be unreasonably dangerous because of an inadequate warning. The LPLA dictates that liability arises under this theory if, at the time the product left the manufacturer's control, the product possessed a characteristic capable of causing damage and the manufacturer did not use reasonable care in providing an adequate warning of the characteristic and its dangers.[190] Whether the manufacturer knew or should have known of the danger associated with the product at the time of distribution is relevant in determining whether he exercised reasonable care.[191] Nevertheless, the LPLA does not mandate that the plaintiff show such knowledge.[192] Thus, "reasonable care" under the LPLA differs from the negligence standard in that knowledge of the risk may be presumed.[193] The LPLA also imposes a post-manufacture duty to warn.[194] If a manufacturer learns of a dangerous condition in his product after placing the product on the market, or if he should have learned of the defect had he acted as a "reasonably prudent manufacturer," he has a continued duty to warn of the characteristic and its danger.[195]

The manufacturer, however, can escape liability by rebutting the presumption of knowledge.[196] This provision provides a requirement of scienter, which allows the manufacturer to escape liability if he proves that the existence of the characteristic and its danger were unknowable at the time.[197] The element of scienter creates a negligence standard in a failure to warn case.[198] Similar to the use of affirmative defenses, a defendant's use of scientific unknowability should be treated as "controverting" the evidence, rendering the evidence admissible.

Thus, theories of liability established by the LPLA vary in relative strengths of associated inferences of fault; however, combining these inferences with a strong social policy mandates exclusion of evidence of subsequent remedial measures.[199]

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190. LA. REV. STAT. ANN. § 9:2800.57(a) (2005). See id. section 9:2800.53(9) for the definition of "adequate warning."
191. Kennedy, *supra* note 45, at 617.
192. *Id.* (citing LA. REV. STAT. ANN. § 9:2800.57 (2005)).
193. Maraist & Galligan, *supra* note 29, at § 15-11.
194. LA. REV. STAT. ANN. § 9:2800.57(C) (2005).
195. Kennedy, *supra* note 45, at 619 (discussing LA. REV. STAT. ANN. § 9:2800.57(C) (2005)).
196. Maraist & Galligan, *supra* note 29, at § 15-11 (citing LA. REV. STAT. ANN. § 9:2800.59(B) (2005)).
197. Kennedy, *supra* note 45, at 620–21.
198. *Id.*
199. FED. R. EVID. 407 advisory committee's note (1972).

2. Policy Considerations

The relevancy concern in analyzing probative worth is an important factor in excluding evidence of subsequent remedial measures. The Louisiana Legislature, however, recognized that the "major policy ground for this exclusion" was the social policy of "encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."[200] Thus, the current interpretation of article 407, as excluding products liability from the subsequent remedial measures rule, contradicts the universally-recognized social policy of encouraging evolved safety measures.[201]

The distinction between negligence and products liability becomes "hypertechnical" when analyzing policy considerations.[202] Although the trier of fact may be examining the condition of the product, in reality the suit is against the manufacturer, not the product, and it is the manufacturer who is responsible for implementing or delaying subsequent remedial measures,[203] presumably based on an awareness of favorable and unfavorable effects.

A fear of negative legal repercussions arising from post-accident remedial measures likely will cause a manufacturer to hesitate in changing a product, regardless of the theory upon which he ultimately is charged.[204] While proponents of the *Ault* rationale deem "incentive-based arguments" to be "mere academic musings" inapplicable to the manufacturer's decision-making process, observers have reported evidence refuting this assertion and confirming that manufacturers consider rules regarding subsequent remedial measures in deciding whether to implement changes.[205] In response to charges that it would be reckless for a manufacturer to not implement post-accident changes, Judge Posner explained that:

> [A]ccidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will

200. 1988 La. Sess. Law Serv. 515, 1122 (West).

201. See above discussion on the general rule regarding evidence of subsequent remedial measures established in *Givens*.

202. Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980).

203. *Id.* ("From a defendant's point of view it is the fact that the evidence may be used against him which will inhibit subsequent repairs or improvement. It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed.").

204. Rabalais, *supra* note 9, at 990.

205. *See, e.g.*, Carver, *supra* note 36, at 595–96.

> sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.[206]

He deemed the deterrent effect equally likely, regardless of whether the underlying theory of liability was negligence or product liability.[207]

Excluding evidence of subsequent remedial measures promotes innovation by eliminating inferential guilt from these activities.[208] For example, when analyzing the costs and benefits of a given innovation, the balance often considers the threat of litigation and greater vulnerability of liability associated with the proposed innovation.[209] These concerns undoubtedly stifle a manufacturer's drive to improve and innovate.[210]

C. Jury Confusion Is an Important Side Effect of Admitting Evidence of Subsequent Remedial Measures

Related to the policy and relevancy concerns is the fear that encouraging weak inferences in assessing liability promotes jury confusion. It has been recognized that a jury could perceive evidence of remedial changes as an admission of legal fault, understandably discouraging a manufacturer from implementing such repairs.[211] Critics warn that although evidence of subsequent remedial measures is not probative of a product's characterization as unreasonably dangerous, it "may become so in the eyes of juries incapable of limiting the evidence to its proper use."[212] Judge Posner recognized this possibility, which reinforced his conviction that policy concerns are applicable to a manufacturer, regardless of whether the suit is predicated on negligence or products liability.[213] He explained, "[i]t is only because juries are believed to overreact to evidence of subsequent remedial measures that the admissibility of such evidence could deter defendants from taking such measures."[214]

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206. Flaminio v. Honda Motor Co., 733 F.2d 463, 469 (7th Cir. 1984).
207. *Id.*
208. Hoffman & Zuckerman, *supra* note 12, at 509.
209. *Id.* at 510.
210. *Id.*
211. Kimball, *supra* note 138, at 1419 (citing Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981)).
212. *Id.* at 1429.
213. Flaminio v. Honda Motor Co., 733 F.2d 463, 471 (7th Cir. 1984).
214. *Id.*

D. The Substantive Differences Between Federal Rule 407 and Louisiana Article 407 Encourage Forum Shopping.

Finally, the *Toups* interpretation of Louisiana Code of Evidence article 407 encourages forum shopping by plaintiffs asserting a cause of action under products liability.[215] Louisiana manufacturers will remove cases to federal court when possible to avoid the harsh evidentiary rules that *Toups* imposes. Similarly, plaintiffs will employ strategies to avoid diversity of citizenship in order to litigate the issue in state court under the insulation of the *Toups* rule.[216] Even though both courts will be applying the substantive law of the LPLA, the evidentiary rules will work differently under the current regime since the 401/403 balance affords discretion to the trial judge, while Rule 407 employs per se rules of non-admissibility.[217] Forum shopping undermines the fairness and efficiency of the Louisiana judicial process.[218] By modeling Louisiana's interpretation of the subsequent remedial measures rule on the federal rule, the threat of forum shopping can be eliminated.

Thus, the current state of Louisiana Code of Evidence article 407 calls for revitalization. The federal position undoubtedly presents an evidentiary standard equally as necessary in Louisiana as it is at the federal level and in numerous other states. The legislature has already performed a balancing of values and determined that the detrimental effects of including evidence of substantive remedial measures "substantially outweighs" any probative value such evidence may have. This balance is applicable when the evidence is used in a products liability case as well. Thus, application of the 401/403 balance is neither necessary nor appropriate. Moreover, including products liability within the ranks of "negligence or culpable conduct" is consistent with the liability regime imposed by the LPLA. Strong social policy mandating exclusion combined with weak inferences of guilt arising from the evidence further dictate that such evidence should be excluded. Finally, evidence of subsequent remedial measures inspires juror confusion and encourages forum shopping. Therefore, once reexamined, Louisiana should amend its position and exclude evidence of subsequent remedial measures in products liability cases. However, should the manufacturer utilize one of the affirmative defenses provided by the LPLA, the evidence will be admissible, thereby preserving the areas in which the legislature deemed the probative worth sufficient to merit inclusion.

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215. Bienvenu, *supra* note 9, at 1082.
216. *Id.*
217. *Id.*
218. *Id.* at 1082–83.

V. CONCLUSION

The exclusion of evidence of subsequent remedial measures is a universally accepted doctrine when applied to negligence and culpable conduct. In the last decade, the federal circuits collectively convinced Congress to amend Federal Rule of Evidence 407 to include products liability within the scope of the general subsequent remedial measures rule. In doing so, Congress explicitly recognized that the policy concerns facing a manufacturer necessitate protection under the rule. Louisiana, however, has not similarly amended its position, although the comments and courts expressly cited the federal rule as the model upon which Louisiana Code of Evidence article 407 was originally fashioned.

Instead, Louisiana continues to allow evidence of post-accident changes to be admitted as evidence when the theory of culpability is products liability, despite the fact that the case cementing this interpretation has been attacked by numerous writers. Article 407 must be revisited, and, upon reevaluation, Louisiana must adopt the federal position. The need to encourage manufacturers to continually improve their products necessitates exclusion of such evidence, as does the understanding that evidence of subsequent changes is irrelevant in proving liability under the LPLA. The concerns motivating the exceptions to per se exclusion can be adequately protected by admitting evidence of subsequent remedial measures when the manufacturer attempts to escape liability through an affirmative defense. Should the Louisiana Supreme Court reverse the *Toups* decision as this comment urges, an amendment to article 407 will not be necessary, as products liability arguably falls under the ambit of "culpable conduct" as provided for by the article. Regardless of the means of repairing the subsequent remedial measures problem, Louisiana must alter its antiquated position or risk impeding progress.

Erin G. Lutkewitte[*]

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* I would like to thank Professor Frank L. Maraist for his invaluable assistance and insight in developing this topic. I would also like to dedicate this comment to my friend and fellow law student Joseph Ryan LoProto (1980–2005).